

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, June 14, 2017
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. The following rulings are tentative. The tentative ruling will not become the final ruling until the matter is called at the scheduled hearing. **Pre-disposed matters will generally be called, and the rulings placed on the record at the end of the calendar.** Any party who desires to be heard with regard to a pre-disposed matter may appear at the hearing. If the party wishes to contest the tentative ruling, he/she shall notify the opposing party/counsel of his/her intention to appear. **If no disposition is set forth below, the hearing will take place as scheduled.**

2. Submission of Orders:

Unless the tentative ruling expressly states that the court will prepare an order, then the tentative ruling will only appear in the minutes. If any party desires an order, then the appropriate form of order, which conforms to the tentative ruling, must be submitted to the court. When the debtor(s) discharge has been entered, proposed orders for relief from stay must reflect that the motion is denied as to the debtor(s) and granted only as to the trustee. Entry of discharge normally is indicated on the calendar.

3. Matters Resolved Without Opposition:

If the tentative ruling states that no opposition was filed, and the moving party is aware of any reason, such as a settlement, why a response may not have been filed, the moving party must advise Vicky McKinney, the Calendar Clerk, at (559) 499-5825 by 4:00 p.m. the day before the scheduled hearing.

4. Matters Resolved by Stipulation:

If the parties resolve a matter by stipulation after the tentative ruling has been posted, but **before the formal order is entered on the docket**, the **moving party** may appear at the hearing and advise the court of the settlement or withdraw the motion. Alternatively, the parties may submit a stipulation and order to modify the tentative ruling together with the proposed order resolving the matter.

5. Resubmittal of Denied Matters:

If the moving party decides to re-file a matter that is denied without prejudice for any reason set forth below, the moving party must file and serve a new set of pleadings with a new docket control number. It may not simply re-notice the original motion.

THE COURT ENDEAVORS TO PUBLISH ITS PREDISPOSITIONS AS SOON AS POSSIBLE, HOWEVER CALENDAR PREPARATION IS ONGOING AND THESE PREDISPOSITIONS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 A.M.

1. [17-11200](#)-B-13 RONNIE/MARCELLA GASTELUM MOTION TO DISMISS CASE
MHM-1 5-17-17 [[25](#)]
MICHAEL MEYER/MV
MARK ZIMMERMAN/Atty. for dbt.

The trustee's motion has been withdrawn. No appearance is necessary.

2. [17-11004](#)-B-13 SANTIAGO/VELIA VALDOVINOS MOTION TO VALUE COLLATERAL OF
TOG-1 BANK OF AMERICA, N.A.
SANTIAGO VALDOVINOS/MV 5-5-17 [[21](#)]
THOMAS GILLIS/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The debtors shall submit a proposed order consistent with this ruling as set forth below. No appearance is necessary.

This motion to value the collateral for a consensual lien against real property was fully noticed in compliance with the Local Rules of Practice and there was no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Based on the evidence offered in support of the motion, the respondent's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. The debtors may proceed under state law to obtain a reconveyance of respondent's trust deed upon completion of the chapter 13 plan and entry of the discharge. If the chapter 13 plan has not been confirmed, then the order shall specifically state that it is not effective until confirmation of the plan.

This ruling is only binding on the named respondent in the moving papers and any successor who takes an interest in the property after service of the motion.

3. [17-11004](#)-B-13 SANTIAGO/VELIA VALDOVINOS MOTION TO VALUE COLLATERAL OF
TOG-2 EDUCATIONAL EMPLOYEES CREDIT
SANTIAGO VALDOVINOS/MV UNION
5-5-17 [[26](#)]

THOMAS GILLIS/Atty. for dbt.
WITHDRAWN

This motion has been withdrawn. No appearance is necessary.

4. [17-10805](#)-B-13 JOANN FRAIRE MOTION TO DISMISS CASE
MHM-1 5-8-17 [[21](#)]
MICHAEL MEYER/MV
RICHARD STURDEVANT/Atty. for dbt.

The trustee's motion has been withdrawn. No appearance is necessary.

5. [15-10412](#)-B-13 SAMUEL/MARIA ZENDEJAS MOTION TO MODIFY PLAN
GMA-1 5-5-17 [[53](#)]
SAMUEL ZENDEJAS/MV
GEOFFREY ADALIAN/Atty. for dbt.

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules of Practice; there is no opposition and the respondents' default will be entered. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

6. [17-11113](#)-B-13 SHAWN FREDE AND MISTY MOTION TO DISMISS CASE
MHM-1 CRUZ-FREDE 5-17-17 [[19](#)]
MICHAEL MEYER/MV
JOEL WINTER/Atty. for dbt.

The trustee's motion has been withdrawn. No appearance is necessary.

7. [17-12022](#)-B-13 JASON SCHULTZ
THL-1
MASTRO PROPERTY MANAGEMENT,
INC./MV
TYLER LESTER/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-31-17 [[13](#)]

This matter will proceed as scheduled. This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling granting in part and denying in part the motion for relief from stay. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay. Relief under §362(d)(4) will be denied because it is only available to a creditor whose claim is secured by an interest in the subject real property and movant here is the property manager for the owner.

The proposed order shall specifically describe the property or action to which the order relates.

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show that movant obtained relief under §362 in the debtor's prior bankruptcy case on May 13, 2017. The debtor has no equity in the subject property as it is a residential lease.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

8. [17-11425](#)-B-13 STACY SCHREINER

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-22-17 [[27](#)]

JERRY LOWE/Atty. for dbt.

This matter will be called as scheduled. If the installment payments now due have not been paid by the time of the hearing, the case will be dismissed. If the installment payments now due are fully paid by the time of the hearing, the OSC will be vacated.

If the OSC is vacated, the court will modify the order permitting the payment of filing fees in installments to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

9. [17-11129](#)-B-13 ROGELIO SALCEDO AND
TOG-1 FRANCES RUIZ
ROGELIO SALCEDO/MV
THOMAS GILLIS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF
BANK OF AMERICA, N.A.
5-5-17 [[16](#)]

The motion will be granted without oral argument based upon well-pled facts. The debtors shall submit a proposed order consistent with this ruling as set forth below. No appearance is necessary.

This motion to value the collateral for a consensual lien against real property was fully noticed in compliance with the Local Rules of Practice and there was no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Based on the evidence offered in support of the motion, the respondent's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. The debtors may proceed under state law to obtain a reconveyance of respondent's trust deed upon completion of the chapter 13 plan and entry of the discharge. If the chapter 13 plan has not been confirmed, then the order shall specifically state that it is not effective until confirmation of the plan.

This ruling is only binding on the named respondent in the moving papers and any successor who takes an interest in the property after service of the motion.

10. [17-11135](#)-B-13 MARIA MACIEL
MHM-1
MICHAEL MEYER/MV
THOMAS GILLIS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
5-12-17 [[17](#)]

The trustee's motion has been withdrawn. No appearance is necessary.

11. [17-11345](#)-B-13 VALINA WISNER
RMP-1
DITECH FINANCIAL LLC/MV

GLEN GATES/Atty. for dbt.
RENEE PARKER/Atty. for mv.
RESPONSIVE PLEADING

AMENDED OBJECTION TO
CONFIRMATION OF PLAN BY DITECH
FINANCIAL LLC .
5-25-17 [[18](#)]

This matter will be continued to July 27, 2017, at 1:30 p.m. The court will issue an order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. At the continued hearing, if the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter and set an evidentiary hearing.

The court notes that there is a motion to dismiss scheduled to be heard on June 29, 2017.

12. [17-11059](#)-B-13 SHANNON/LESLIE BAKER
MHM-1
MICHAEL MEYER/MV
SUSAN HEMB/Atty. for dbt.

MOTION TO DISMISS CASE
5-12-17 [[20](#)]

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondents' default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The record shows there has been unreasonable delay by the debtors that is prejudicial to creditors caused by the failure to provide the trustee with required documentation, and failure to file a complete schedule I. Accordingly, the case will be dismissed.

13. [17-10064](#)-B-13 JOE HAYES
THL-2
MRO INVESTMENTS, INC./MV
JERRY LOWE/Atty. for dbt.
TYLER LESTER/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-31-17 [[69](#)]

This matter will proceed as scheduled. This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling granting in part and denying in part the motion for relief from stay. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay. Relief under §362(d)(4) will be denied because it is only available to a creditor whose claim is secured by an interest in the subject real property. The movant is the purchaser at the January 11, 2017, foreclosure sale. No *nunc pro tunc* relief will be granted as the record shows the movant was served with notice of the bankruptcy case. No evidence or supporting authority for *nunc pro tunc* relief was provided.

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the debtor has no equity in the subject property.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

14. [17-11373](#)-B-13 RAMON MENDOZA

THOMAS GILLIS/Atty. for dbt.
INSTALLMENT FEE PAID \$79.00
ON 5/23/17

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-18-17 [[18](#)]

The OSC will be vacated. The record shows that the installment fees now due have been paid. No appearance is necessary.

The order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

15. [14-13374](#)-B-13 DAVID MARTINEZ
TCS-1
DAVID MARTINEZ/MV
TIMOTHY SPRINGER/Atty. for dbt.

CONTINUED MOTION TO MODIFY PLAN
4-13-17 [[22](#)]

The defaults of respondents were entered and this matter was continued for submission of additional evidence showing that the elements of §1325(a)(8) for confirmation were satisfied. If such evidence has not been submitted prior to the continued hearing then the motion will be denied without prejudice. If the evidence has been submitted prior to the hearing, no appearance will be required and the motion will be granted and the plan confirmed.

16. [17-11174](#)-B-13 JOSE RAMOS AND GABRIELA
MHM-1 HERNANDEZ
MICHAEL MEYER/MV
THOMAS GILLIS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
5-12-17 [[16](#)]

Unless the trustee's motion is withdrawn prior to the hearing, this matter will proceed as scheduled. Unless the trustee's motion is withdrawn at the hearing the court intends to grant the motion to dismiss on the grounds stated in the motion.

While the debtor filed a timely reply, no evidence supports the debtor's contention that the documents were sent to the trustee or, more importantly, why they were not timely provided.

17. [12-17276](#)-B-13 CHRISTOPHER/CINDY
BCS-3 DESUTTER

MOTION FOR COMPENSATION FOR
BENJAMIN C. SHEIN, DEBTORS
ATTORNEY(S)
5-12-17 [[39](#)]

BENJAMIN SHEIN/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here. Accordingly, the respondents' defaults will be entered.

18. [17-10076](#)-B-13 ALVINO GARCIA
JRL-2
ALVINO GARCIA/MV
JERRY LOWE/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO CONFIRM
PLAN
3-22-17 [[46](#)]

This matter will be continued to July 27, 2017, at 1:30 p.m. The court will issue an order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. At the continued hearing, if the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter and set an evidentiary hearing.

19. [17-11377](#)-B-13 AVON SHAKESPEARE
RMP-1
SPECIALIZED LOAN SERVICING
LLC/MV
JANINE ESQUIVEL/Atty. for dbt.
RENEE PARKER/Atty. for mv.

AMENDED OBJECTION TO
CONFIRMATION OF PLAN BY
SPECIALIZED LOAN SERVICING LLC
5-10-17 [[20](#)]

This matter will be continued to Friday, July 7, 2017, at 9:30 a.m. The court will issue an order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. At the continued hearing, if the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter and set an evidentiary hearing.

The court notes that the amended objection to confirmation was not filed in conformance with the Local Rules of Practice for the U.S. Bankruptcy Court, Eastern District of California, 9014-1(e)(3), and with Appendix II, EDC.002-901, E.D. Cal. Bankruptcy Court's Guidelines for the Preparation of Documents (effective August 12, 2015), Section III.A., V.A. and B. The objection must be amended no later than 7 days before the continued hearing or the objection will be denied and dropped from calendar.

20. [15-10679](#)-B-13 HARVEY JONES
RSW-4
HARVEY JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO SELL
5-31-17 [[44](#)]

This motion will, again, be denied without prejudice. The court will enter an order. No appearance is necessary.

Unless the court, for cause shown, shortens the time or directs another method of giving notice, a hearing on the sale of property of the estate outside the ordinary course of business requires 21 day notices to the trustee and all creditors by mail. This motion to sell the debtor's residence was served on May 31, 2017, only 14 days prior to the hearing.

21. [15-10679](#)-B-13 HARVEY JONES
RSW-5
HARVEY JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO INCUR DEBT
5-31-17 [[48](#)]

This motion was served pursuant to LRB 9014-1(f)(2) and will proceed as scheduled.

22. [17-10483](#)-B-13 CONSOLACION ATAYDE AND
MHM-2 MARIA SORIANO
MICHAEL MEYER/MV
THOMAS GILLIS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
5-17-17 [[48](#)]

The trustee's motion has been withdrawn. No appearance is necessary.

23. [17-11093](#)-B-13 JESSE LOPEZ
MHM-1
MICHAEL MEYER/MV
JOEL WINTER/Atty. for dbt.

MOTION TO DISMISS CASE
5-17-17 [[17](#)]

The trustee's motion has been withdrawn. No appearance is necessary.

24. [13-11094](#)-B-13 JOSEPH/NIVIA LOURENCO
BCS-3

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF SHEIN LAW GROUP,
PC FOR BENJAMIN C. SHEIN,
DEBTORS ATTORNEY(S)
5-12-17 [[34](#)]

BENJAMIN SHEIN/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here. Accordingly, the respondents' defaults will be entered.

25. [16-10294](#)-B-13 LINA CONTRERAS
WAR-1
LINA CONTRERAS/MV
WILLIAM ROMAINE/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO CONFIRM
PLAN
11-30-16 [[87](#)]

This matter will be dropped from calendar. The record shows that the debtor has filed a modified plan and therefore this motion will be deemed withdrawn. The court will enter an order. No appearance is necessary.

26. [16-10294](#)-B-13 LINA CONTRERAS
WAR-2
LINA CONTRERAS/MV
WILLIAM ROMAINE/Atty. for dbt.

MOTION TO CONFIRM PLAN
5-4-17 [[113](#)]

This motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

The proof of service fails to comply with LBR 9014-1(e) (3).

In addition, the record does not show that the debtor filed and served the proposed modified plan with the moving papers in compliance with LBR 3015-1(c) (3) & (d) (1).

Finally, the proposed chapter 13 plan is not dated and was not signed by anyone.

27. [16-10294](#)-B-13 LINA CONTRERAS
WAR-3
LINA CONTRERAS/MV

MOTION TO AVOID LIEN OF
INTERINSURANCE EXCHANGE OF THE
AUTOMOBILE CLUB
5-26-17 [[123](#)]

WILLIAM ROMAINE/Atty. for dbt.

This motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

The record does not establish that the motion was served on the named respondent in compliance FRBP 7004(b)(3) (corporation, partnership or unincorporated association). *In re Villar*, 317 B.R. 88 (9th Cir. BAP 2004). Information regarding service on a corporation may be obtained from the California Secretary of State's Internet Website, see <http://kepler.sos.ca.gov/>. Litigants are encouraged to attach a copy of their information source (web page, etc.) to the proof of service to assist the court in evaluating compliance with Rule 7004.

In addition, the proof of service of the documents was not filed in compliance with LBR 9014-1(e)(3), and the form of the proof of service does not comply with LBR 9014-1(d)(2) and 9004-1(see Local Rules, Appendix II, EDC.002-901, Revised Guidelines for the Preparation of Documents (5)).

10:30 A.M.

1. [16-10016](#)-B-13 KEVIN DAVEY CONTINUED STATUS CONFERENCE RE:
[16-1074](#) AMENDED COMPLAINT
 DAVEY V. OCWEN LOAN SERVICING, 11-18-16 [[84](#)]
 LLC ET AL
 VINCENT GORSKI/Atty. for pl.
 RESPONSIVE PLEADING

This matter will proceed as a scheduling conference.

2. [15-12689](#)-B-7 MARK HANSEN STATUS CONFERENCE RE: COMPLAINT
[17-1042](#) 4-17-17 [[1](#)]
HANSEN V. OCWEN LOAN
SERVICING, LLC ET AL
PETER ISOLA/Atty. for def.

This status conference will be continued to June 28, 2017, at 1:30 p.m., to be heard with the defendants' motion to dismiss the complaint. The court will enter an order. No appearance is necessary.

1:30 P.M.

1. [17-10327](#)-B-12 EDWARD/LISA UMADA

CONTINUED STATUS CONFERENCE RE:
CHAPTER 12 VOLUNTARY PETITION
1-31-17 [[1](#)]

PETER FEAR/Atty. for dbt.

This matter will proceed as scheduled.

2. [17-10327](#)-B-12 EDWARD/LISA UMADA

MOTION TO CONFIRM CHAPTER 12
PLAN
5-8-17 [[59](#)]

FW-4

EDWARD UMADA/MV

PETER FEAR/Atty. for dbt.

RESPONSIVE PLEADING

The hearing will proceed as a scheduling conference for a contested evidentiary hearing. The court will set deadlines including discovery cutoff after consultation with counsel. The court finds "cause" to extend the time within which a Plan must be confirmed under 11 U.S.C. § 1224.

The debtors proposed a Chapter 12 Plan on May 1, 2017. Two creditors initially objected: Citizens Business Bank (CBB) and the Madera Water District. The water district has withdrawn its objections. CBB has not. There are numerous factual issues that need to be determined including the following:

1. Whether the proposed sale of Field 38 will pay off CBB's liens. If not, the extent of remaining collateral is unknown. 11 U.S.C § 1225(a)(5)(B) requires that a secured creditor, CBB here, retains the lien securing its claim and receive property with a value, as of the Plan's effective date, that is not less than the allowed amount of the claim. CBB's claims are not subject to objection. While a debtor may modify a secured claim under § 1222, such modification is restricted by the confirmation requirements of § 1225. The lien retention requirement is strictly construed. *See, In re Clark*, 288 B.R. 237, 249-51 (Bankr. D. KS 2003) and *In re Heath*, 483 BR 708, 712-13 (Bankr. E.D. AK 2012).

The proposed Plan here contemplates the sale of Field 38 but, other than attaching CBB's lien to the proceeds (*see*, § 1206), does not provide for the retention of CBB's lien on all of its collateral. Without evidence about the value of the remaining collateral or a valuation hearing, the court is not able to confirm the Plan without CBB retaining its lien. The Plan is not proposing a replacement lien or other protection of the interest (*see*, § 1205).

2. The appropriate interest rate for the lengthy amortization proposed by the Plan. *Till v. SCS Credit Corp*, 541 U.S. 465, 479 (2004) requires an evidentiary hearing on the issue in absence of the secured creditor's agreement. Here, CBB does not agree. It may be CBB's ultimate burden of proof on the appropriate interest rate, but the debtors have provided

nothing so far other than an argument that 1% over the prime rate is sufficient.

3. Feasibility of the Plan in light of the proposed amortization. Feasibility is ultimately the debtor's burden to prove. *In re Howard*, 212 B.R. 864, 878, 880 (Bankr. E.D. TN 1997). Here, the feasibility proof is the past production, but there is no evidence establishing a basis for the assumption of continued production at similar levels. The debtors' evidence is, that there will be periods of difficult cash flow. While some expenses will be saved with the sale of Field 38 (assuming the debtors get past the \$ 1225 issues) how this impacts the debtors' cash flow is not clear. Further, CBB is entitled to cross-examine the Umadas or other witness(es) on the assumptions.

For the foregoing reasons there is "cause" to continue the time within which a Plan must be confirmed under § 1224.

3. [16-13345](#)-B-11 JONATHAN/PATRICIA MAYER

CONTINUED STATUS CONFERENCE RE:
CHAPTER 11 VOLUNTARY PETITION
9-13-16 [[1](#)]

PETER FEAR/Atty. for dbt.

This matter will proceed as scheduled.

PETER FEAR/Atty. for dbt.

The hearing will proceed as scheduled. The court's tentative ruling is below.

Tentative Ruling- The default of all responding parties will be entered. The approval of the Disclosure Statement will be denied without prejudice and the hearing will be continued to July 6, 2017 at 10:30 a.m. (note different time). Debtor-in-possession will modify the Disclosure Statement and Plan as set forth in this ruling. A redlined version shall be filed by June 30, 2017.

11 U.S.C. § 1125 requires that a Disclosure Statement contain "adequate information" as defined in § 1125(a)(1). As is relevant, the "hypothetical investor" must be provided enough information to "make an informed judgment" about the Plan. In this case the only class of creditors with impaired claims is the general unsecured creditors. After review of the proposed Plan and Disclosure Statement ("P & DS"), the court finds the following deficiencies which should be able to be cured by minor modifications to the P & DS.

First, clarification of the effect of continued litigation between Dr. Mayer and the United States Air Force is required. (P & DS 9:5-17) The discussion in the P & DS states that counsel is continuing to pursue issues surrounding Dr. Mayer's discharge from the service. However, what is the implication of continued litigation? For example, is there some issue about Dr. Mayer's license? Will Dr. Mayer receive damages? There is insufficient information at present.

Second, the description of the treatment of class 2.3 [mortgage on Virginia house] needs to be updated to reflect the short sale which is on calendar for June 14. (P & DS 13:1-12) If the sale is finalized, that information must be added to the discussion so the creditors will know that no dividend is expected from the sale.

Third, the discussion of the timing of the payments to unsecured creditors needs to be clarified. The P & DS says payments to unsecured creditors do not begin for 27 months. However, based on the provisions in the P & DS it will take 34 months for the debtors to pay the proposed amount to unsecured creditors at \$4,150 per month. Notably, 27 months plus 34 months is 61 months. The unsecured creditors need to know they will not be paid their total dividend for five years.

Fourth, the discussion of "cramdown" in section 9.03 should be amended to accurately reflect the realities of how this P & DS will be confirmed. (P & DS 17:1-8). As mentioned in the P & DS, the only class to vote is the

unsecured class. If the unsecured class does not vote or votes against the P & DS there will be no consenting impaired class of creditors voting for the P & DS. Thus the issue will be whether the P & DS is "fair and equitable" under § 1129(b). The impaired class needs to know the P & DS will be confirmed if they will receive property of a value as of the P & DS's effective date equal to allowed amount of their claims.

Fifth, the "Risks" discussion should also include the risk of compromise of Dr. Mayer's license. (P & DS 17:19-18:6) Since the license issue was discussed elsewhere in the P & DS, if there is a license "risk," it must be disclosed. If there is no risk, then the discussion elsewhere in the P & DS needs to be modified to state there is no realistic license risk.

Approval of the Disclosure Statement is denied without prejudice. The debtors shall make the minor modifications required in this ruling and file a redlined version as provided above.

5.	<u>16-13345</u> -B-11	JONATHAN/PATRICIA MAYER	MOTION TO PAY COMMISSION TO
	FW-15		REALTOR
	JONATHAN MAYER/MV		5-17-17 [<u>167</u>]
	PETER FEAR/Atty. for dbt.		

The motion will proceed as scheduled for higher and better bids only. The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order after hearing as specified below.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here. It appears that the sale is a reasonable exercise of the debtor-in-possession's business judgment.

6.	<u>16-12266</u> -B-7	AVTAR SINGH	CONTINUED STATUS CONFERENCE RE:
	<u>16-1109</u>		COMPLAINT
	U.S. TRUSTEE V. SINGH		12-30-16 [<u>1</u>]
	ROBIN TUBESING/Atty. for pl.		
	RESPONSIVE PLEADING		

This matter will proceed as scheduled.

7. [16-12266](#)-B-7 AVTAR SINGH
[16-1109](#) UST-1
U.S. TRUSTEE V. SINGH
ROBIN TUBESING/Atty. for mv.
RESPONSIVE PLEADING

MOTION FOR SUMMARY JUDGMENT
5-5-17 [[22](#)]

This matter will proceed as scheduled. The court intends to enter the following ruling granting the motion for summary judgment under §727(a)(2) and §727(a)(5). The U.S. Trustee shall submit a proposed judgment.

Tentative Ruling. The U.S. Trustee filed this motion for summary judgment in this adversary pleading to deny the Defendant's discharge pursuant to 11 U.S.C. §727(a)(2)(B), §727(a)(4)(A), and §727(a)(5), on May 5, 2017.

Summary judgment should be granted when there are no genuine issues of material fact and when the movant is entitled to judgment as a matter of law. Civil Rule 56 (made applicable to adversary proceedings by Rule 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those that may affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, issues are genuine only if the trier of fact reasonably could find in favor of the nonmoving party on the evidence presented. *Far Out Foods, Inc. v. Oskar*, 247 F. 3d 986, 992 (9th Cir 1997).

In fact, Rule 56 "mandates" entry of summary judgment when, after adequate time for discovery, the nonmoving party fails to present evidence in response to the summary judgment motion sufficient to establish an essential element of that party's case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. As the Supreme Court in *Celotex* explained, "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

Thus, while the movant has the initial burden of identifying the portions of the record demonstrating the absence of a genuine issue of material fact, *id.* at 323, once the movant has come forward with uncontroverted facts entitling it to relief, the burden then shifts to the nonmovant to demonstrate that there are specific and genuine issues of material fact necessitating a trial. *Id.* at 324. The nonmovant must go beyond the pleadings and introduce or point to specific evidence in the record supporting its position. *Id.*

When considering summary judgment a court must view all facts genuinely in dispute "in the light most favorable to the non-moving party." *Scott v. Harris*, 550 U.S. 372, 380 (2007). The court must draw all reasonable inferences in the nonmoving party's favor. *Id.* at 378. Nonetheless, "[e]ven in cases where elusive concepts such as motive and intent are at issue, summary judgment may be appropriate if the nonmoving party rests

merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch)*, 237 B.R. 160, 165 (9th Cir. BAP 1999) (quoting, *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F. 2d 5, 8 (1st Cir. 1990)).

The pleadings related to this matter show that the following facts are undisputed:

1. The Defendant signed the Voluntary Petition, Official Form 106, "Declaration About an Individual Debtor's Schedules," and the Statement of Financial Affairs, all affirming under penalty of perjury that he had read the documents and that they were true and correct and that, after exempt property was excluded and administrative expenses paid, there would be no funds available to distribute to unsecured creditors.
2. In March 2016, approximately three months prior to filing his bankruptcy petition, the Defendant sold the assets of a Subway franchise ("Subway Assets") he owned located at 1135 W. Visalia Road, Exeter, California 93221. This transfer was not disclosed on the Defendant's Statement of Financial Affairs.
3. The transfer of the Subway Assets resulted in net proceeds of \$121,238.21, which proceeds were received, pursuant to a power of attorney granted by the defendant to Pritpal Nagra who subsequently distributed those proceeds to insiders and other creditors of the Defendant, including repayment of a loan to the Defendant's brother-in-law and creditor Gurvinder Singh. These net proceeds, transfers, and preferential payments, were not disclosed on the Defendant's Statement of Financial Affairs nor has the Defendant produced documentation of these payments and transfers.
4. As of the date of this motion the Defendant has not properly amended his schedules to disclose these transfers, receipts, or payments.
5. The Defendant did not disclose the income received from the operation of the Subway Assets during the current year and two previous calendar years.
6. The Defendant has acknowledged he cannot account for approximately \$19,238.21 of the proceeds from the sale of the Subway Assets that were not transferred to the Defendant's brother-in-law or creditor Gurvinder Singh.

In addition to the above facts, the following undisputed facts demonstrate that the Defendant's conduct, in concealing the transfers, was with actual intent to hinder, delay or defraud his other creditors:

1. The sale and transfer occurred approximately two months after DCR Credit Recovery initiated a lawsuit against the Defendant and approximately three months before DCR Credit Recovery obtained a judgment against the Defendant in the amount of \$31,071.79.
2. Two days after DCR obtained the judgment, the Defendant filed his bankruptcy petition.
3. The transfer, for which the Defendant received no consideration, occurred at a time the Defendant was insolvent and the Subway Assets represented substantially all of the debtor's property.

The motion for denial of discharge under §727(a)(2) will be granted. "A party seeking denial of discharge under § 727(a)(2) must prove two things : '(1) a disposition of property, such as a transfer or concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act [of] disposing of the property.'" *Retz v. Samson (In re Retz)* 606 F. 3d 1189, 1200 (9th Cir. 2010 (quoting, *Hughes v. Lawson (In re Lawson)*, 122 F. 3d 1237, 1240 (9th Cir. 1997)).

"[L]ack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy." *Retz*, 606 F. 3d at 1200 (internal citations omitted); see, *Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 242-43 (9th Cir. BAP 2007), *aff'd in part, dismissed in part*, 551 F. 3d 1092 (9th Cir. 2008) ["In other words, proof of mere intent to hinder or delay may lead to denial of discharge."]

Whether a debtor intended to hinder, delay, or defraud a creditor is a question of fact reviewed for clear error. Intent may be inferred from surrounding circumstances or a course of conduct. *Beverly*, 374 B.R. at 243. See also, *In re Searles*, 317 B.R. 368, 379 (citing, *Emmett Valley Assocs. v. Woodfield (In re Woodfield)*, 978 F. 2d 516, 518 (9th Cir. 1992) (intent may be inferred from circumstances surrounding the transaction in question)). Similarly, the debtor's "course of conduct may be probative of the question." *Id.* at 380 (citing, *Devers v. Bank of Sheridan (In re Devers)*, 759 F. 2d 751, 753-54 (9th Cir. 1985)).

In addition, the motion for denial of discharge under §727(a)(5) will also be granted. Objections to discharge are liberally construed in favor of the debtor and against the objector. *Khalil v. Developers Sur. & Indem. Co. (in re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007) *aff'd* 578 F. 3d 1167 (9th Cir. 2009). To establish a *prima facie* case under §727(a)(5), the objector to discharge must demonstrate that: (1) The debtor at one time not too remote to the petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order for relief granted the debtor no longer owned the assets; and (3) the bankruptcy papers do not reflect an adequate explanation for the disposition of the assets. *Retz*, 606 F. 3d at 1205. Once the objector makes a *prima facie* case, the burden shifts to the debtor to offer credible evidence regarding the disposition

of the missing assets. *Id.* The sufficiency of the debtor's explanation, if any, is a question of fact. *See, id.* Based on the record and the undisputed facts, the Defendant's discharge will be denied and a judgment to that effect will issue.

8.	17-11591 -B-11	5 C HOLDINGS, INC.	MOTION FOR RELIEF FROM
	RAS-1		AUTOMATIC STAY
	HITACHI CAPITAL AMERICA		5-15-17 [39]
	CORP./MV		
	LEONARD WELSH/Atty. for dbt.		
	RICHARD SOLOMON/Atty. for mv.		
	RESPONSIVE PLEADING		

This matter will proceed as scheduled.

9.	14-14593 -B-7	WAYNE HEAD	CONTINUED STATUS CONFERENCE
	17-1004		RE: COMPLAINT
	U.S. TRUSTEE V. HEAD		1-24-17 [1]
	ROBIN TUBESING/Atty. for pl.		
	RESPONSIVE PLEADING		

This matter will proceed as scheduled.

10.	14-14593 -B-7	WAYNE HEAD	MOTION FOR SUMMARY JUDGMENT
	17-1004	UST-1	5-4-17 [14]
	U.S. TRUSTEE V. HEAD		
	ROBIN TUBESING/Atty. for mv.		
	RESPONSIVE PLEADING		

This matter will proceed as scheduled. The court intends to enter the following ruling granting the motion for summary judgment under §727(a)(2), §727(a)(3), and §727(a)(5). The U.S. Trustee shall submit a proposed judgment.

Tentative Ruling. The U.S. Trustee filed this motion for summary judgment in this adversary pleading to deny the Defendant's discharge pursuant to 11 U.S.C. §727(a)(2)(B), § 727(a)(3), §727(a)(4)(A), § 727(a)(4)(D), and § 727(a)(5) on May 4, 2017.

Summary judgment should be granted when there are no genuine issues of material fact and when the movant is entitled to judgment as a matter of law. Civil Rule 56 (made applicable to adversary proceedings by Rule 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those that may affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, issues are genuine only if the trier of fact reasonably could find in favor of the nonmoving party on the evidence presented. *Far Out Foods, Inc. v. Oskar*, 247 F. 3d 986, 992 (9th Cir 1997).

In fact, Rule 56 "mandates" entry of summary judgment when, after adequate time for discovery, the nonmoving party fails to present evidence in response to the summary judgment motion sufficient to establish an essential element of that party's case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. As the Supreme Court in *Celotex* explained, "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

Thus, while the movant has the initial burden of identifying the portions of the record demonstrating the absence of a genuine issue of material fact, *id.* at 323, once the movant has come forward with uncontroverted facts entitling it to relief, the burden then shifts to the nonmovant to demonstrate that there are specific and genuine issues of material fact necessitating a trial. *Id.* at 324. The nonmovant must go beyond the pleadings and introduce or point to specific evidence in the record supporting its position. *Id.*

When considering summary judgment a court must view all facts genuinely in dispute "in the light most favorable to the non-moving party." *Scott v. Harris*, 550 U.S. 372, 380 (2007). The court must draw all reasonable inferences in the nonmoving party's favor. *Id.* at 378. Nonetheless, "[e]ven in cases where elusive concepts such as motive and intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch)*, 237 B.R. 160, 165 (9th Cir. BAP 1999) (quoting, *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)).

The pleadings related to this matter show that the following facts are undisputed:

On September 17, 2014, the Defendant filed a voluntary Chapter 13 bankruptcy, subsequently converted to chapter 7 on March 24, 2016. The §341(a) First Meeting of Creditors has been continued numerous times, more than once because of the Defendant's failure to appear and failure to provide documents, and has not yet been concluded.

The issues in this case involve three different assets/transactions. The first is property listed on Schedule B as "Kwee note 27.62% owned by Debtor" with a value of \$145,000. The Defendant was told by the chapter 13 trustee's counsel not to spend the money once he received it. In addition, the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" ("Rights and Responsibilities") signed by the Defendant on September 17, 2014, provides that the debtor agrees to "Contact the attorney before transferring, selling, encumbering, refinancing, or otherwise disposing of any personal or real property with value of \$1,000 or more."

At the 5/9/16 Meeting of Creditors, the Defendant testified that he received \$143,000, the balance of the Kwee Note, in April 2015, and testified that he paid some bills and invested the remainder, as much as \$100,000, with an individual named "Darrell Redondo" ("Mr. Redondo"). The Defendant did not seek court authority before diverting the funds of the Kwee Note. In addition to paying bills and investing money with Mr. Redondo, the Defendant testified that he also purchased a truck with the proceeds for \$2,000. Subsequently, the Defendant changed his story with regards to the payments on the "investment" as well as the total amount "invested." Despite repeated demands, the Defendant has failed to provide documentation related to this loan, and therefore the true amounts and terms are unknown.

The movant claims in reply only the "Kwee Note" is the subject of the claim under §727(a)(2). Nevertheless, the two other transactions are also relevant.

The second transaction is listed on schedule B as "Steve Deblauw. Note due in full May 1, 2015," and lists a value of \$100,000. The Defendant has produced no documentation regarding this asset and the evolution of his testimony is inconsistent and contradictory.

As to this asset, also, the Defendant was cautioned by the attorney for the Chapter 13 Trustee not to spend the money once received. However, at the 5/9/16 Meeting of Creditors, the Defendant testified that he sold property located on "Crow Street" and gave \$156,000, the proceeds of the sale, to Steve Deblauw ("Mr. Deblauw"). At the 5/9/16 Meeting, the Defendant testified that Mr. Deblauw also owed him an additional \$250,000 on what the Defendant called the "Ray Dorriety" loan. The testimony that the Defendant loaned Mr. Deblauw \$156,000 and an additional \$250,000 conflicts with Schedule B which discloses that Mr. Deblauw actually owes the Defendant \$100,000. On Schedule I, the Defendant listed income from "Tarusa 2 Rent" of \$2,216.72. At the 5/9/16 Meeting, the Defendant testified that the "Tarusa 2 Rent" of \$2,216.72 was actually Mr. Deblauw's payment on the loans as well as permitting Mr. Deblauw use of one of the buildings on the Defendant's property. At the 6/6/16 Meeting, the Defendant testified that Mr. Deblauw had not yet sent him money. This contradicts his earlier testimony that the note was "due in full" in May 2015, and the Defendant's prior testimony that the \$2,216.72 he receives in "rent" was actually for the repayment of the loans.

At the 9/6/16 Meeting, the Defendant testified that he took out a note secured against one of his rental properties located at 15361 Ave. 280, Visalia, California and gave the funds to Mr. Deblauw as a loan, in the amount of \$150,000 ("Bret Holiday" loan). This loan was not previously mentioned by the Defendant, and contradicts earlier testimony regarding loans to Mr. Deblauw, as well as contradicts Schedule B, which provides that Mr. Deblauw owed him \$100,000. At the 10/3/16 Meeting, the Defendant testified that the total amount he gave to Mr. Deblauw for loans was \$100,000, contradicting all prior testimony.

Third, at the 5/9/16 Meeting, the Defendant testified that he owed his brother, Tyrone Head ("Tyrone Head"), approximately \$160,000. At the 9/6/16 Meeting, the Defendant testified that he owed Tyrone Head approximately \$140,000. Later in that same Meeting, he testified the amount was \$240,000. However, the Defendant did not disclose Tyrone Head as a creditor in his schedules. At the time of filing on or about September 17, 2014, the Defendant actually owed Tyrone Head approximately \$217,451.52. At the time the Defendant presented testimony on May 9, 2016, the Defendant actually owed Tyrone Head approximately \$241,201.52, which contradicts his testimony at the 5/9/16 Meeting. The Rights and Responsibilities signed by the Debtor provides that the Debtor agrees to "Contact the attorney before incurring new debt exceeding \$1,000." Between the date of filing and the conversion of the case on March 24, 2016, the Defendant received loans from Tyrone Head totaling \$23,750. The \$23,750 referenced above, includes eleven separate loans, five of which exceed \$1,000.

Although the Defendant argues that distribution of his assets will satisfy the claims filed in the case, "[L]ack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy." *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1200 (9th Cir. 2010) (internal citations omitted); see, *Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 242-43 (9th Cir. BAP 2007), *aff'd in part, dismissed in part*, 551 F. 3d 1092 (9th Cir. 2008) ["In other words, proof of mere intent to hinder or delay may lead to denial of discharge."]

Section 727(a)(3) of the Bankruptcy Code provides that the court shall grant the debtor a discharge, unless "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]"

Intent is not an element of §727(a)(3). *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1297 (9th Cir. 1994) ("'[I]ntent to conceal one's financial conditions is not a necessary element for the denial of discharge under §727(a).'" (Internal citation omitted.) It is the debtor's burden to show that the failure to keep adequate business records was justified under all the circumstances, and, "[i]f the lack of records is not adequately explained, the debtor is not entitled to a discharge." *Id.*, internal citations omitted. "If the extent and nature of the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, she must show more than that she did not comprehend the need for them." *Id.*, internal citations omitted.

The Defendant testified that he kept no contemporaneous books and records regarding these numerous and substantial business transactions, and the fact that his oral testimony regarding these transactions has been contradictory and ever-changing makes it impossible for the trustee and the

creditors to gain an understanding of the debtor's financial circumstances.

To prevail on a claim brought under Section 727(a)(3), the Plaintiff bears the burden of establishing: (1) that the Defendant failed to maintain and preserve adequate records and (2) that such failure made it impossible to ascertain the Defendant's financial condition and material business transactions. *In re Caneva*, 550 F.3d 755, 761 (9th Cir. 2008). Under the facts set forth above, the Plaintiff has met her burden. The Defendant has no contemporaneous records regarding the transactions at issue. Accordingly, the burden of proof then shifts to the Defendant to justify the inadequacy or nonexistence of records under the circumstances of this case. *Id.* at 763.

The Defendant has not presented evidence to the court that justifies his failure to keep records regarding these not-insignificant transactions. The court finds that it was inadequate for the Defendant to have: invested or loaned as much as \$100,000 to Mr. Redondo and have no written records to account for it and to provide inconsistent testimony regarding repayment of the money with no written records to verify repayment terms, etc.; to have loaned as much as \$406,000 to Mr. Deblauw and have no written records to account for it, especially in light of the Defendant's changing testimony regarding the transactions; with regards to the Kwee Note, for the Defendant to say he received \$143,000 and then provide inconsistent testimony regarding the disposition of those funds.

In addition, the motion for denial of discharge under §727(a)(5) will also be granted. Objections to discharge are liberally construed in favor of the debtor and against the objector. *Khalil v. Developers Sur. & Indem. Co. (in re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007) *aff'd* 578 F. 3d 1167 (9th Cir. 2009). To establish a *prima facie* case under §727(a)(5), the objector to discharge must demonstrate that: (1) The debtor at one time not too remote to the petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order for relief granted the debtor no longer owned the assets; and (3) the bankruptcy papers do not reflect an adequate explanation for the disposition of the assets. *In re Retz*, 606 F.3d at 1205. Once the objector makes a *prima facie* case, the burden shifts to the debtor to offer credible evidence regarding the disposition of the missing assets. *Id.* The sufficiency of the debtor's explanation, if any, is a question of fact. *See, id.*

The motion for denial of discharge under §727(a)(2) will be granted. "A party seeking denial of discharge under § 727(a)(2) must prove two things : '(1) a disposition of property, such as a transfer or concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act [of] disposing of the property.'" *Retz v. Samson (In re Retz)* 606 F. 3d 1189, 1200 (9th Cir. 2010 (quoting, *Hughes v. Lawson (In re Lawson)*, 122 F. 3d 1237, 1240 (9th Cir. 1997)).

Whether a debtor intended to hinder, delay, or defraud a creditor is a question of fact reviewed for clear error. Intent may be inferred from surrounding circumstances or a course of conduct. *In re Beverly*, 374 B.R. 221, 243 (9th BAP 2007).

Based on the record and the undisputed facts that have been recited, *supra*, the Defendant's discharge will be denied and a judgment to that effect will issue.